Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

DAVID ROLAND HINKSON,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner, a federal criminal defendant awaiting trial for nonviolent crimes, has been held in pretrial detention for almost a year. The questions presented are:

1. Whether, consistent with *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988), a disqualified judge's findings may be given binding effect by a newly assigned judge reviewing pretrial detention issues.

2. Whether federal courts have the power and duty under the Due Process Clause, upon request by a defendant, to grant a new hearing where pretrial detention has lasted much longer than originally contemplated.

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Appendix 1a

I

OPINIONS BELOW

The court of appeals' order (Pet. App. 1a) is unreported. It affirmed a district court order (Pet. App. 2a-15a) that in turn had accorded binding law of the case effect to a prior judge's detention order (Pet. App. 16a-23a). The judge who issued that prior detention order later recused himself (Pet. App. 24a-25a). All district court orders in this case are unreported.

JURISDICTION

The court of appeals' judgment was entered on February 27, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The relevant provisions of the Bail Reform Act, 18 U.S.C. 3141 *et seq.*, are reproduced in Pet. App. 26a-32a. The Fifth Amendment provides in relevant part that "No person shall ... be deprived of life, liberty, or property, without due process of law...." The federal judicial disqualification statute provides in relevant part (28 U.S.C. 455):

> (a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:
>
> (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding. * * *

STATEMENT

Petitioner is a successful businessman, with no criminal record or violent history, who has been detained as an alleged danger and flight risk for more than 11 months while awaiting trial in Idaho federal court on entirely nonviolent offenses (many misdemeanors). Petitioner was, according to the government, "the largest private employer in Idaho County, and [] one of the largest UPS shippers in the state." Doc. 145 at 2; ER 121.[1] The federal district judge who ordered petitioner detained thereafter recused himself from the detention issue, effectively acknowledging that he never should have adjudicated that issue. Pet. App. 24a-25a. The newly-assigned district judge (a Ninth Circuit judge sitting by designation) nonetheless denied a de novo detention hearing because he felt "bound" by the disqualified judge's findings under the law of the case doctrine. Pet. App. 10a; *see also id.* at 2a, 13a. The court of appeals affirmed that ruling. Pet. App. 1a.

1. In July 2002, a sealed 43-count indictment was returned in the District of Idaho. It charged petitioner with misdemeanor and felony tax offenses, misdemeanor violations of the Food, Drug and Cosmetic Act, and felony violations (many of which since have been dismissed) alleging that petitioner structured his company's payroll deposits to avoid bank reporting requirements. Doc. 1 at 1-26; ER 1-26. The indictment was not unsealed until November 2002 when a warrant authorizing a search of petitioner's business was also executed. Doc. 5. The trial court repeatedly has made findings that the underlying case is "complex." *E.g.*, Docs. 48 at 1; 173 at 9 & n.3; 232 at 2.

---

[1] "Doc. __ at __" refers to the district court record by document and page number. The full text of most documents filed in the District of Idaho is retrievable online through the federal courts' "RACER" system in place for that District. "ER" refers to the Excerpts of Record filed by petitioner in the court of appeals.

Trial has been continued several times, not only on defense motions but also on government motion (Docs. 165, 173) and for reasons of court congestion (Doc. 161). Trial currently is set to begin April 26, 2004. Doc. 237.

After the indictment was unsealed and petitioner arrested, the government moved unsuccessfully to have petitioner detained as a flight risk. Doc. 9 at 1-2; ER 35-36. The federal magistrate judge instead released petitioner on personal recognizance. Doc. 7; ER 29. In January 2003, after a passport issue arose, the magistrate judge continued release but added an unsecured $100,000 bond. Doc. 39. The government never appealed the release orders.

Petitioner's criminal case originally was assigned to the Honorable Edward J. Lodge, one of two Art. III judges in the District of Idaho. On March 31, 2003, without explanation (but for reasons that later became clear), Judge Lodge reassigned all further proceedings in the case to his colleague, the Honorable B. Lynn Winmill. Doc. 56; ER 78.

2. On April 4, 2003, the government moved to revoke the release order. Doc. 58; ER 80-91. The motion alleged that petitioner had violated his release conditions by committing a federal crime while on release: threatening federal officials (Judge Lodge, the prosecutor and case agent), in violation of 18 U.S.C. 115. Doc. 58 at 6: ER 85.

Petitioner was arrested pursuant to a warrant that had been issued without any oath or affirmation. A federal magistrate judge held a release revocation/detention hearing on April 9, 2003. The government presented the hearsay testimony of FBI Special Agent William R. Long. ER 183-217. Agent Long recounted statements of three individuals (James "J.C." Harding, Harding's girlfriend Annie Bates, and Marianna Raff) regarding defendant's alleged threats against federal officials and others. *Id.* Agent Long testified that Harding had claimed that petitioner had offered him, in

Bates' presence in January 2003, $10,000 to kill various federal officials; Harding initially "thought that Mr. Hinkson must be joking, he didn't take him seriously...." ER 188. Agent Long also recounted claims by Marianna Raff, a former employee whom defendant had fired and accused of stealing money, regarding a similar offer petitioner allegedly made to Raff's brothers while on a trip to Mexico in December 2001. ER 196-199.

The defense introduced – as Defendant's Exhibit 1 – the full tape of a March 27, 2003, conversation between FBI informant Harding and petitioner. ER 231. That conversation was arranged and secretly recorded by Agent Long as an investigative "technique" to "provide an opportunity for [petitioner] to either repeat the threat or to gather evidence that he had in fact" made past threats against federal officials. ER 194. Agent Long conceded that defendant did not make any threats during the tape-recorded conversation. ER 237-238. The defense subsequently had the full tape-recorded conversation transcribed and made part of the record in this case. *See* Doc. 76 and Exh. A thereto; ER 285-339 (excerpts from that 177-page transcript).

The transcript showed that, despite persistently leading overtures from informant Harding during the secretly-recorded meeting, petitioner did not utter or acknowledge previously having made any true threat. It was Harding, acting covertly on behalf of the government, who first suggested that "killing" or flight might be the best answer to petitioner's legal predicaments. *See* ER 289 ("You think somewhere somebody just start killing, go, okay, this is enough. They're not railroading me anymore"); *see also* ER 292 ("Yeah, if I hang out with you long enough I always want to flee the country"). Petitioner, however, rejecting the informant's overtures, repeatedly made clear his intent to fight government officials by way of the *judicial system*:

> I've been fighting in their ... system using their system against them. [ER 293]
>
> THE INFORMANT: [S]o you think you can beat them with their own system.
> [PETITIONER]: Yeah. [ER 309]
>
> I do more to piss them off fighting them using their Babylon system than you can imagine. [ER 312]
>
> [T]here's a way to hurt them and the way to hurt them is to beat them in court and teach 10,000 other people how to kick their ass. That's why I started HARPP, Help Americans Release Political Prisoners. [ER 320]

When informant Harding made a veiled offer to kill federal officials, petitioner rejected the solicitation. Instead, petitioner made clear, he intended to press on with previously-filed civil lawsuits against federal officials:

> THE INFORMANT: I want to know something for sure. This is dead serious what I'm asking you this. [*Sic.*] You talked to me about this on a couple of occasions. Do you want to do it? Do you not want to do it?
> [PETITIONER]: What?
> THE INFORMANT: You know what I'm talking about. I can handle it.
> [PETITIONER]: What?
> THE INFORMANT: Your problem with the three wisemen.
> [PETITIONER]: *I'm just suing them.*

ER 311 (emphasis added).

The federal magistrate judge revoked petitioner's release and ordered him detained as a danger and flight risk. Doc. 68; ER 94. He stated orally that defendant previously had offered money to have federal officials killed and even if that "wasn't done with intent" it "evidences recklessness, callous disregard for the safety of any individual and that somebody may take him up on his offer." ER 281.

3. In April 2003, petitioner timely invoked his right to an Art. III district judge's independent review of detention. Docs. 70, 76. The district court (Winmill, J.) did not rule until September 2003. Judge Winmill recognized he was required to conduct prompt "*de novo* review, paying no deference to the Magistrate Judge's [Detention] Order." Pet. App. 17a (citing *United States v. Koenig*, 912 F.2d 1190, 1192-93 (9th Cir. 1990)). He also recognized there may be "a general credibility issue concerning Agent Long." *Id.*[2]

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[2] There were several credibility issues surrounding Agent Long's testimony. For example, Agent Long testified that, when informant Harding offered to kill federal officials for petitioner, petitioner's "response was he considers it for a couple of seconds and then he says, 'Let me sit on it.'" ER 195. In fact, the tape recording showed that petitioner never said he would "sit on it" but rather rejected the informant's offers outright and explained: "I'm just suing them." ER 311. In a related vein, Agent Long testified "there were several times when Harding makes reference to the prior conversations about killing feds ... [a]nd at no time during that conversation did [petitioner] say anything along the lines of what are you talking about or that never happened...." ER 194. In fact, petitioner specifically asked Harding "what" he was talking about (ER 311) and stated repeatedly that he had "[n]ot talk[ed] about hiring hitmen" and "I didn't hand anybody money to go kill them." ER 295. (Tellingly, during the recorded conversation informant Harding did not contradict, but instead agreed with, that last denial, stating: "Right." *Id.*) And, when asked whether petitioner had mentioned his lawyer upon being arrested, Agent Long testified that petitioner "never said anything like that." ER 206. In fact, a tape recording of the arrest showed that petitioner asked Agent Long "I can't call my lawyer?" and Agent Long replied, "Not right now you can't." ER 107. This caused Judge Winmill to "disregard[]" the government's introduction of petitioner's post-arrest statements (Pet. App. 18a).

Judge Winmill acknowledged that the detention issue "was not promptly resolved" and that he was "troubled by the passage of time"; he "offer[ed] no excuses for this failure other than [an] exceedingly busy trial calendar and case load." *Id.* at 22a & n.1.

When the district court finally approved detention, trial was less than a month off. On its own initiative, however, the court continued trial from September 29, 2003, to November 3, 2003. Doc. 161. Thereafter, and over defense objection (Doc. 172), the court granted a government motion (Doc. 165), and continued trial to December 1, 2003. Doc. 173. Defendant later was allowed to change counsel, and trial has been continued on defense motions; it is now scheduled to begin April 26, 2004. Doc. 237.

4. In December 2003 and January 2004, with new counsel, petitioner moved to revoke the detention order and for a de novo hearing. Docs. 219, 220, 236. The motions were accompanied by affidavits from the hearsay declarants' friends, family and associates attacking the declarants' credibility. Docs. 221-227; ER 126-151. Petitioner argued there was no evidence or finding that he gone beyond free speech protected by the First Amendment by making a "true threat" violative of 18 U.S.C. 115, and that extended pretrial detention violated due process absent a new hearing to consider later developments. Doc. 219 at 1-3; ER 122-124.

Petitioner moved to reassign the detention issue to Ninth Circuit Judge Tallman, who had just been designated to preside over trial. Doc. 242; ER 152-157. The motion suggested Judge Winmill's recusal was required under 28 U.S.C. 455(a) because "[i]n a small two-judge District such as [the District of Idaho], a reasonable person might well question the impartiality of one judge reviewing the sufficiency of evidence regarding a crime allegedly committed against the second judge." Doc. 242 at 3; ER 154. It also suggested that recusal would be required under 28

U.S.C. 455(b)(1) if Judge Winmill had off-the-record meetings that gave him "'personal knowledge of disputed evidentiary facts concerning the proceedings.'" Doc. 242 at 2-3; ER 153-154 (quoting statute).

5. On January 23, 2004, Judge Winmill recused himself. Pet. App. 24a-25a. He denied having actual bias, but did not address whether he had any personal knowledge of disputed evidentiary facts that would require recusal under 28 U.S.C. 455(b)(1). Instead, he recused himself under 28 U.S.C. 455(a) because "[a]s the Supreme Court has explained "The goal of section 455(a) is to avoid even the appearance of impartiality.'" Pet. App. 24a (quoting *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 860 (1988)). Judge Winmill "did not disagree with [petitioner's] contention that a reasonable person might question whether this Court could be impartial in a detention determination where the central issue is whether the Defendant threatened the life of the only other district judge in Idaho." *Id.* at 24a-25a. He accordingly "refer[red] all motions relating to [petitioner's] detention to Judge Tallman." *Id.* at 25a.

6. On January 29, 2004, Judge Tallman rejected petitioner's challenges and denied a new detention hearing. Pet. App. 2a-15a. He specifically declined to "reopen" the "two prior judicial determinations of facts" by Judge Winmill and the magistrate judge. *Id.* at 2a, 10a, 13a. Judge Tallman felt "*bound* by the[se] prior findings" as "law of the case." *Id.* at 10a (emphasis added). He added that even were he to reopen the evidence regarding the alleged threats, petitioner had "not presented any new legal arguments or evidence to *rebut*" the prior judges' "alternate finding that [petitioner] also poses a flight risk." *Id.* at 10a-11a (emphasis added). Judge Tallman held that the length of detention did not require reopening the hearing and did not violate due process because most of the pretrial delay was attributable to petitioner's motions and changes of counsel. *Id.* at 12a-13a.

7. Petitioner timely noticed his appeal to the Ninth Circuit Court of Appeals. Doc. 255; ER 179 (Notice of Appeal filed Jan. 30, 2004). That court had jurisdiction pursuant to 18 U.S.C. 3145(b) and 28 U.S.C. 1291.

Petitioner's first argument was that Judge Tallman violated *Liljeberg* by refusing de novo review of detention and instead citing the law of the case doctrine as binding him to findings of a disqualified judge. Pet. C.A. Br. at 2-5; Pet. C.A. R. Br. at 1-5. Petitioner argued that he had never received a de novo hearing before an apparently impartial Art. III judge. *Id.*[3] Petitioner requested that the court of appeals order Judge Tallman to consider de novo the difficult legal and factual issues raised by the continuing detention. Pet. C.A. Br. at 20; Pet. C.A. R. Br. at 10.

The court of appeals affirmed in a one-page order that did not cite *Liljeberg* or address the lack of a de novo detention hearing before an Art. III judge free from the appearance of partiality. The court wrote simply that:

> The district court correctly found that [petitioner] did not present any new exculpatory evidence that was material to the detention issues. *See* 18 U.S.C. § 3142(f). Further, the pretrial detention in this case has not been excessively prolonged or violative of due process under the circumstances here. *See United States v. Gelfuso*, 838 F.2d 358, 359 (9th Cir. 1988).

Pet. App. 1a.

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[3] In response to the government's contention that petitioner had not specifically sought the magistrate judge's recusal, petitioner argued that: a) if Judge Lodge's colleague was disqualified from reviewing evidence of threats against him, so too was Judge Lodge's subordinate; and b) in any event petitioner was entitled to an Art. III judge's de novo review. Pet. C.A. R. Br. 4 (citing *Koenig*, 912 F.2d at 1192-93).

REASONS FOR GRANTING THE PETITION

The court of appeals upheld pretrial detention of a presumptively innocent man who has now been imprisoned for almost a year without independent review by an apparently impartial Art. III district judge. There are two reasons this Court should grant certiorari. First, by allowing the new district judge to accord binding law of the case effect to detention findings of a disqualified judge, the court of appeals so far departed and sanctioned a departure from the fundamental teachings of *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988), as to call for an exercise of this Court's supervisory power. Second, the lower courts' refusal to reopen the detention hearing absent a showing of "new exculpatory" evidence conflicts with decisions of other federal courts of appeals holding that where pretrial detention is extended, due process requires a new hearing at which the government must make a showing stronger than that required for initial detention.

I. The Lower Courts' Denial of Fresh Consideration of a Disqualified Judge's Pretrial Detention Order Conflicts With this Court's *Liljeberg* Decision.

Petitioner has been imprisoned almost a year without review by an Art. III district judge free from the appearance of impartiality. The judge who belatedly approved pretrial detention (some five months into it) recused himself four months later in an order that makes clear he never should have adjudicated the matter. The newly-assigned judge, in an order affirmed by the court of appeals, then invoked the law of the case doctrine to accord binding effect to the disqualified judge's findings. Such judicial legerdemain disregards *Liljeberg* and cries out for this Court's correction.

Liljeberg held that an improper failure to recuse under 28 U.S.C. 455(a) justified applying a collateral challenge rule (Fed. R. Civ. P. 60(b)) to vacate a final judgment. The Court,

focusing on the "fairness to the particular litigants," adopted a balancing test of whether there is "a greater risk of unfairness in upholding the judgment in favor of [the prevailing party] than there is in allowing a new judge to take a fresh look at the issues." *Id.* at 868. A court must consider not only "the risk of injustice to the parties in the particular case" but also "the risk that the denial of relief will produce injustice in other cases." *Id.* at 864. And, a court "must continuously bear in mind that to perform its high function in the best way justice must satisfy the appearance of justice." *Id.* at 864 (internal quotations omitted). *Cf. Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 828 (1986) (where state judge was disqualified on due process grounds, "the 'appearance of justice' will best be served by vacating the decision and remanding for further proceedings").

The present case does not involve strong interests of repose because, unlike in *Liljeberg*, there was no final judgment. Petitioner is seeking neither "a draconian remedy" nor the "reopening of closed litigation" (*Liljeberg*, 486 U.S. at 862-63). Bail rulings remain subject to change, as illustrated by this case in which a prior release order was revoked. The Bail Reform Act provides that a "hearing may be reopened ... at any time before trial" based on previously-unknown material evidence. 18 U.S.C. 3142(f). That, moreover, is not the exclusive basis for revoking a detention order. *E.g.*, *United States v. Archambault*, 240 F. Supp.2d 1082, 1084 (D.S.D. 2002) (revoking detention order "[a]side from the gateway for further review provided by § 3142(f)"); *see also United States v. Hare*, 873 F.2d 796, 799-801 (5th Cir. 1989), and the other cases discussed *infra* in Section II.

The lower courts in this case never balanced the *Liljeberg* factors. It is clear, had they done so, that a new judge would have been required to "take a fresh look at the [detention] issues" decided by the since-disqualified judge (486 U.S. at 868).

Defendant has a strong interest in an impartial Art. III district judge taking a fresh look at the ongoing detention. The district court's role is critical because "factual findings in a bail hearing are to be reviewed under a deferential, clearly erroneous standard." *United States v. Townsend*, 897 F.2d 989, 994 (9th Cir. 1990). *Cf. In re Continental Airlines*, 981 F.2d 1450, 1463 (5th Cir. 1993) (standard of appellate review relevant to *Liljeberg* reopening inquiry). Here, a court must resolve key credibility issues surrounding the testifying FBI agent and his hearsay declarants.

No countervailing interests justify denying a fresh look. The government cannot show any "special hardship by reason of [its] reliance on the original" bail ruling (*Liljeberg*, 486 U.S. at 868-69). Law of the case is a particularly weak reed for declining to reopen bail findings of a disqualified judge. Indeed, law of the case "is something of a misnomer" here because "[i]t does not counsel a court to abide by its own prior decision in a given case, but goes rather to an appellate court's relationship to the court of trial." *United States v. Wells*, 519 U.S. 482, 487 n.4 (1997); *see also* 18B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure: Jurisdiction 2d* § 4478.1 (2002) (district court's "undoubted power to revise" an earlier ruling exists equally where the case is reassigned from another district judge). And, even "[a]ssuming for argument's sake that the doctrine applies here, it simply 'expresses' common judicial 'practice'; it does not 'limit' the courts' power." *Castro v. United States*, 124 S. Ct. 786, 793 (2003) (quoting *Messinger v. Anderson*, 225 U.S. 436, 444 (1912) (Holmes, J.)). Accordingly, law of the case does not require adherence to a prior decision if doing so would "work a 'manifest injustice.'" *Agostini v. Felton*, 521 U.S. 203, 236 (1997); *see, e.g., Dobbs v. Zant*, 506 U.S. 357, 359 (1993) (remanding for court of appeals to consider a new transcript in deciding whether to "apply the manifest injustice exception to the law of the case doctrine").

Using the law of the case doctrine to deny petitioner de novo review by a non-disqualified Art. III district judge plainly worked a manifest injustice. This Court has recognized a presumptively innocent defendant's "strong interest in liberty" and the "fundamental nature of this right." *United States v. Salerno*, 481 U.S. 739, 750 (1987); *see also Stack v. Boyle*, 342 U.S. 1, 4 (1951) ("Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning"). In upholding the Bail Reform Act against a facial constitutional challenge, *Salerno* stressed the "extensive [procedural] safeguards" surrounding a detention order (481 U.S. at 752) – including the requirement that "[i]n a full-blown adversary hearing, the Government must convince *a neutral decisionmaker*" that pretrial detention is justified. *Id.* at 750 (emphasis added).

Petitioner has been detained almost a year without de novo review of the detention by an Art. III judge having the appearance of impartiality demanded by 28 U.S.C. 455(a). The prior decision of a statutorily-disqualified judge arguably was so procedurally flawed that it did not even qualify as a hearing under 18 U.S.C. 3145(b). *Cf. United States v. Montalvo-Murillo*, 495 U.S. 711, 717 (1990) ("It is conceivable that some combination of procedural irregularities could render a detention hearing so flawed that it would not constitute 'a hearing'" within meaning of a different provision of the Bail Reform Act); *Nguyen v. United States*, 539 U.S. 69 (2003) (non-Art. III judge's improper participation required vacating Ninth Circuit judgment). The Court need not go that far, however, to hold under *Liljeberg* that petitioner is entitled to a new detention hearing that does not give binding or persuasive effect to a disqualified judge's findings.

II. The Lower Courts' Refusal to Reopen Detention Conflicts With Other Federal Appeals Court Decisions Requiring a New Hearing and Stronger Government Proof Where Detention Lasts Much Longer Than Originally Contemplated.

Even apart from the recusal issue, the lower courts took an unduly restrictive view – one which conflicts with other federal appeals courts – regarding when a prior detention hearing should be reopened. This Court in *Salerno* "intimate[d] no view as to the point at which detention in a particular case might become excessively prolonged, and therefore punitive, in relation to Congress' regulatory goal." 481 U.S. at 748 n.4. Federal courts, before and after *Salerno*, have taken different approaches to making that decision. The present case affords an opportunity for this Court to provide much-needed guidance in this important area.

Other federal appeals courts have suggested that due process requires at least a new hearing where detention extends longer than first contemplated. In *United States v. Accetturo*, 783 F.2d 382, 388 (3d Cir. 1986), the court wrote that "at some point due process may require a release from pretrial detention or, at a minimum, a fresh proceeding at which more is required of the government than is mandated by [18 U.S.C.] section 3142." Similarly, the Seventh Circuit has written that: "A defendant may at any time request that the district court reconsider the detention order. If Mr. Portes believes that pre-trial delays are unreasonable he may seek reconsideration." *United States v. Portes*, 786 F.2d 758, 768 n.14 (7th Cir. 1985).

The Fifth Circuit actually ordered such a hearing in the post-*Salerno* case of *Hare*. The defendant there had been detained "more than four months at the time of the [district court] ruling" and "more than ten months" by the time of appeal. 873 F.2d at 800. The court held that defendant was

not entitled to "a second hearing" on "statutory grounds" because he had not presented "new evidence" under 18 U.S.C. 3142(f). *See* 873 F.2d at 799. It held, however, that he was entitled to a new hearing as a matter of due process to consider not only "factors relevant to the initial detention decision" but also "additional factors" bearing on the extent of the detention. *Id.* at 800. The Fifth Circuit added that "[i]n considering the facts concerning risk of flight and dangerousness, [defendant] may present to the court any condition he is willing to abide by if he is released, such as daily reporting to an appropriate government official." *Id.*

In *United States v. Gonzales Claudio*, 806 F.2d 334 (2d Cir.), *cert. dismissed*, 479 U.S. 978 (1986), the Second Circuit went even further: ordering not just a new hearing but outright release. Defendants there had been confined 14 months when appeal was heard and a lengthy trial was not scheduled to begin for another four months. *Id.* at 341. The court held that defendants initially had been detained properly as flight risks. *Id.* at 337-39, 343. Nonetheless, while there was "a reasonable basis for inferring that appellants might flee rather than attend their trial," the evidence did "not establish that risk to a degree sufficient to render continued detention within constitutional limits." *Id.* at 343. The Second Circuit explained that "[i]n mandating fundamental fairness, the Due Process Clause endeavors to set outer limits at which risks to society must be accepted to avoid unconscionable deprivations of the liberty of individuals." *Id. Cf. United States v. Tortora*, 922 F.2d 880, 895 (1st Cir. 1990) (then-Chief Judge Breyer, concurring) ("Where two or three years of *pre-trial* detention is at stake, and the detention is in a distant facility, requiring counsel to drive several hours to confer with his client, conditions that impose cost burdens upon the government might well seem more 'reasonable' than in more usual circumstances").

Due process does not impose categorical rules regarding the permissible length of pretrial detention. For example, courts have upheld pretrial detention of 30 months or more for defendants accused of terrorism offenses. *See, e.g.*, *United States v. El-Hage*, 213 F.3d 74, 79-81 (2d Cir. 2000); *United States v. El-Gabrowny*, 35 F.3d 63, 65 (2d Cir. 1994). Even in terrorism cases, however, courts have warned that the defendant "may renew his motion in the district court" and "in the event of a substantial further delay, the government may be required to make a more convincing showing of his dangerousness and/or risk of flight." *Id.*

The Ninth Circuit, however, has rejected a due process challenge to an anticipated ten months' pretrial detention based solely on "the government's lack of responsibility for [the] pretrial delay." *United States v. Gelfuso*, 838 F.2d 358, 359 (9th Cir. 1988). And, the Seventh Circuit expressly has held that "[i]f the judge and prosecutor are doing all they reasonably can be expected to do to move the case along, and the statutory criteria for pretrial detention are satisfied, then we do not think a defendant should be allowed to maintain a constitutional challenge to that detention." *United States v. Infelise*, 934 F.2d 103, 104 (7th Cir. 1991); *see also id.* at 104-05 ("[t]o get to first base," a defendant challenging the constitutionality of extended pretrial detention "must show that either the prosecution or the court has unnecessarily delayed in bringing the case to trial"). A lower court within the Ninth Circuit, after canvassing the case law, did not read *Gelfuso* as having accorded the same "dispositive power" to the wrongful delay factor as the Seventh Circuit did in *Infelise*. *United States v. Ailemen*, 165 F.R.D. 571, 581-82 (N.D. Cal. 1996).

Petitioner here is arguing only that due process requires a new hearing and not outright release. The courts below held, contrary to cases such as *Hare*, that petitioner was not even entitled to a new detention hearing.

The need for a new detention hearing is particularly acute under the extraordinary facts of this case. Petitioner already has been detained almost a year awaiting trial on indicted nonviolent crimes that could not themselves have supported pretrial detention on dangerousness grounds under 18 U.S.C. 3142(f). *See Salerno*, 481 U.S. at 747 ("Bail Reform Act carefully limits the circumstances under which detention may be sought to the most serious of crimes"; citing section 3142(f) as making "detention hearings available [on dangerousness grounds only] if case involves crimes of violence, offenses for which the sentence is life imprisonment or death, serious drug offenses, or certain repeat offenders"). And, while pretrial detention potentially was available on flight risk grounds, the government had failed to justify such detention before it accused petitioner of the still-uncharged offense of threatening federal officials. Docs. 7, 9; ER 29-36. That threats offense is a most serious one. But where, as here, there are insuperable factual and legal holes in the accusation, and the government still has not charged the crime more than a year after it allegedly occurred, due process requires a new hearing to consider all the relevant facts and circumstances bearing upon the need for and proportionality of continued pretrial detention.

The district court refused to reconsider detention or require any heightened showing; after relieving the government of responsibility for most of the delay, the court held that "it is the law of the case that the government met its burden of proof on both conditions justifying continued detention" and no new evidence justified reopening those findings. Pet. App. 12a-13a. The court of appeals affirmed, citing 18 U.S.C. 3142(f) and *Gelfuso*. Pet. App. 1a. These rulings are contrary to those of other courts that: a) due process may require reopening hearings even where section 3142(f) does not; and b) the due process inquiry is not limited to assessing fault for the pretrial delay.

CONCLUSION

The Court should grant the petition for a writ of certiorari. It may wish to consider summary reversal on Question 1.

Respectfully submitted,

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March 12, 2004.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee v. DAVID ROLAND HINKSON, Defendant-Appellant	No. 04-30042 D.C. No. CR-02-00142-BLW District of Idaho, Boise ORDER

Before: FERNANDEZ, W. FLETCHER and RAWLINSON, Circuit Judges

The district court correctly found that appellant did not present any new exculpatory evidence that was material to the detention issues. *See* 18 U.S.C. § 3142(f). Further, the pretrial detention in this case has not been excessively prolonged or violative of due process under the circumstances here. *See United States v. Gelfuso*, 838 F.2d 358, 359 (9th Cir. 1988).

The district court's detention order is

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	Case No. CR-02-142-C-BLW
v.	)	**MEMORANDUM DECISION AND ORDER**
DAVID ROLAND HINKSON,	)	
Defendant.	)	

Pending before the Court are Defendant David Roland Hinkson's Motion to Revoke Detention Order and to Grant Immediate Release on Conditions (Docket No. 219) and Defendant's Motion for Expedited De Novo Hearing on Motion to Revoke Detention Order and Grant Immediate Release on Conditions (Docket No. 236). In summary, the defendant seeks to reopen his detention hearing pursuant to 18 U.S.C. § 3142. Because two prior judicial determinations of facts justifying detention are the law of the case, the defendant bears a heavy burden to meet the requirements to reopen these issues. After reviewing the parties' briefing filed in connection with all detention issues since the inception of the case, including the most recent seven affidavits of defense witnesses filed December 31, 2003, the transcript of the April 9, 2003, detention hearing, and Defense Exhibit 1 (the transcript of a conversation recorded on March 27, 2003, between the defendant and government witness James Harding), and the detention orders previously entered by U.S. Magistrate Judge Mikel Williams and Chief

U.S. District Judge B. Lynn Winmill, the Court rules as follows:

BACKGROUND

On July 17, 2002, a federal grand jury sitting in Coeur d'Alene, Idaho, returned a forty-three count indictment that charged the defendant with three counts of willful failure to file an income tax return, thirteen counts of willful failure to collect federal payroll withholding taxes, four counts of introducing a misbranded drug into interstate commerce, four counts of introducing an adulterated drug into interstate commerce, one count of introducing a misbranded device into interstate commerce, one count of introducing an adulterated device into interstate commerce, sixteen counts of structuring financial transactions, and one count of criminal forfeiture. Five counts of structuring financial transactions have since been dismissed and are not material to the detention issue. A warrant based on the indictment was issued and the defendant was arrested on November 19, 2002.

At the defendant's initial appearance, Judge Williams released him on his personal recognizance, imposing conditions that prohibited the defendant from foreign travel outside the continental United States and required him to surrender his U.S. passport. After the defendant applied for another passport, on January 22, 2003, Judge Williams found that the defendant had violated the conditions of his release. The defendant's conditions were then modified to require a $100,000 unsecured bond to be posted payable to the United States should he fail to appear as required. The defendant surrendered his second passport on January 27, 2003.

On April 4, 2003, a second arrest warrant was issued after the United States moved for revocation of the release order. 18 U.S.C. § 3148. The government's motion was based on an investigation initiated in March 2003 by FBI

Special Agent William R. Long that established probable cause to believe the defendant had committed a federal offense while on release by threatening federal officials under 18 U.S.C. § 115. Agent Long's investigation established the following evidence: (1) testimony by James Harding, an associate of the defendant, who stated that the defendant repeatedly offered him $10,000 each to kill United States District Judge Edward Lodge, Assistant United States Attorney (AUSA) Nancy Cook, and IRS Special Agent Steve Hines (the original trial judge, prosecutor, and case agent in the pending criminal indictment against the defendant that is now set for trial before the undersigned United States circuit judge); (2) an audio recording of a conversation between the defendant and Harding, in which the defendant made statements indicating an intent to flee the United States, to transfer funds to offshore accounts, and to kill the aforementioned federal officials and their children; (3) corroborating testimony of Annie Bates, a former employee of the defendant, who was present during one such conversation between Harding and the defendant and who recalled other conversations in which the defendant had expressed a desire to kill AUSA Cook and Special Agent Hines and an intent to flee to Antigua if it looked as though the government's case against him would prevail; and (4) corroborating testimony of Mariana Raff, a former employee of the defendant, who recalled the defendant's statements about his desire to flee the country prior to trial and to kill AUSA Cook and Special Agent Hines, and who also recalled a trip with the defendant to Mexico, where he solicited Raff's two brothers to kill AUSA Cook Special Agent Hines, a local attorney, the defendant's ex-wife, and two judges.

The government's motion for revocation of release referenced other documentary evidence discovered that corroborated the defendant's trip to Mexico with Raff, his transfer of funds to financial institutions in foreign countries,

his purchase of land in Mexico, and his withdrawal of large amounts of cash. On the basis of this evidence, the government asserted that the defendant posed a risk to the security of these federal officials, their families, and other persons, and that he posed a risk of flight to a foreign country to evade trial.

Pursuant to the April 4, 2003, arrest warrant, the defendant was again arrested and held until an April 9, 2003, detention hearing conducted before Judge Williams. The government offered the evidence summarized above in the form of testimony by FBI Special Agent Long. Harding, Bates and Raff did not appear as witnesses, though Agent Long testified about the hearsay statements each witness had made to him or other agents during the FBI investigation. Agent Long also testified to post-arrest admissions made by the defendant on April 4, in which Agent Long asked the defendant whether he had ever offered money to pay for the hurting or killing of Judge Lodge, AUSA Cook, Special Agent Hines, or Dennis Albers (a local Grangeville, Idaho, attorney). The defendant responded, "I never, with intent, said I would pay to kill someone." In summary, Agent Long testified that the defendant was attempting to exculpate himself by suggesting that he never intended that anyone would be hurt by the offer. Significantly, the defendant did not deny having had conversations in which money was mentioned in connection with eliminating federal officers.

At the detention hearing, the defendant provided testimony from his father, Roland C. Hinkson, who testified that his son was not a violent person. Also called as a defense witness was the manager of the defendant's WaterOz company, Geraldynne Gray, who explained that the defendant frequently traveled internationally on company business. After weighing the evidence, Judge Williams found by a preponderance of the evidence that the defendant was a flight risk and by clear and convincing evidence that he

posed a risk to the safety of the community. 18 U.S.C. § 3148(b).

On April 23, 2003, the defendant filed objections to the detention order in which he argued, *inter alia*, that the government had not met its burden of proof at the hearing. On September 4, 2003, Chief Judge Winmill conducted a de novo review of the detention order and concluded that Magistrate Judge's factual determinations were supported by sufficient evidence. Judge Winmill confirmed Judge Williams' rulings and also found the detention justified on both grounds – risk of flight and danger to the community.

On December 31, 2003, the defendant filed the present Motion to Revoke the Detention Order and Grant Immediate Release on Conditions. His accompanying Motion for an Expedited De Novo Hearing on the issue was filed on January 6, 2004. The defendant has now been in pretrial detention pursuant to the detention order for approximately ten months.

I. Motion to Revoke Detention Order and to Grant Immediate Release on Conditions.

The defendant argues that (1) his new evidence in form of affidavits establishes that the hearsay evidence of witnesses Harding, Bates, and Raff presented by the government through Agent Long at the April 2003 detention hearing was unreliable; (2) the United States failed to introduce clear and convincing evidence that the defendant was guilty of threatening three federal officials by offering murder contracts on their lives in violation of 18 U.S.C. § 115; and (3) the defendant's continuing detention on these uncharged allegations raised due process concerns. Each argument is addressed in turn below.

A. New evidence provided in affidavits.

Title 18 U.S.C. § 3142(f)(2) provides that:

> [A] hearing may be reopened . . . at any time before trial if the judicial officer finds that information exists that was not known to the movant at the time of the hearing and that has a material bearing on the issue whether there are conditions of release that will reasonably assure the appearance of such person as required and the safety of any other person and the community.

On September 4, 2003, Chief Judge Winmill issued his decision affirming the Magistrate Judge's detention order and again found that the defendant not only posed a danger to the community but also that he was a flight risk. The defendant has now, nine months after the detention hearing, submitted several affidavits for purposes of impeaching the government's three witnesses who told the FBI in March 2003 that the defendant had offered $10,000 to kill Judge Lodge, AUSA Cook, and Special Agent Hines.

To justify the reopening of the detention decisions, the defendant must show that each affidavit he now proffers (1) contains evidence not available at the time of the initial detention hearing that (2) has a material bearing on the issue of whether the defendant could be released on conditions sufficient to ensure that he would attend all future court proceedings and that his release would not pose a threat to the due administration of justice. 18 U.S.C. § 3142(f)(2).

1. Affidavit of Marda Marie Towerton: Ms. Towerton is the defendant's ex-wife. She asserts that the defendant is a generous and non-violent man who meets or exceeds his child support obligations, is a good father, and treats his employees well. She cites the defendant's

experiences with two of his former employees as evidence that some ex-employees have previously attempted to harm the defendant by making false claims against him. The defendant does not explain how this evidence was unknown to him at the time of the detention hearing, or not obtainable prior to Chief Judge Winmill's September 2003 de novo review of the April 2003 detention order. In addition, this evidence consists of personal opinion testimony that has no material bearing on whether the hearsay statements of government witnesses Harding, Bates, and Raff, that the defendant solicited their help in murdering federal officers, are credible.

There is some proffered evidence in this affidavit that does have a bearing on the government's claims: Ms. Towerton now asserts that Agent Long falsely testified that the defendant attempted to hire Mariana Raff's brothers in Mexico in December 2001, to kill AUSA Cook because at that time the defendant did not know Ms. Cook. However, Ms. Towerton does not establish any personal knowledge of whether the defendant knew of Ms. Cook's role in the ongoing federal criminal investigation of the defendant at that time. Instead, her statement is contradicted by the fact that Ms. Cook had caused the issuance of investigative grand jury subpoenas to several WaterOz employees in September 2001, and that the defendant was aware of the federal subpoenas served on his employees during that investigation.

In addition, Ms. Towerton asserts that the defendant was planning to open a health clinic in Antigua. This assertion does not contradict the government's evidence offered in support of detention that the defendant had stated his plans to transfer money overseas, had in fact mortgaged his Idaho property to raise funds, had transferred funds to Mexico and Antigua, had tried to procure a replacement passport after surrendering his U.S. passport as a condition of his November 2002 release, and had stated that he might

"end up" in Antigua if it looked like he was going to be convicted. The Towerton affidavit does not meet the requirements of 18 U.S.C. § 3142(f)(2) for reopening the detention hearing.

2. Affidavits of Roland C. Hinkson, Quinn D. Raff, Tracy L. Adams, Douglas E. Hohman, Samantha Burke, and Wesley W. Hoyt (for John Harding): This affiants also express personal opinions regarding the defendant's non-violent character, as well as the reputations of Mariana Raff, Annie Bates, and James Harding in the rural Grangeville, Idaho, community as untruthful persons. The defendant has failed to explain how this general impeachment information was not known to him at the time of or shortly after his April 2003 detention hearing. Indeed, the FBI interview of Mariana Raff reveals that she was known to and was interviewed by attorneys representing the defendant in April 2003.

In addition, these affidavits express personal opinions that do not have a material bearing on whether or not the defendant was actively preparing to flee or whether he had on several occasions offered money to arrange the deaths of federal officials involved in this case. None of the affiants claimed to have been present during, or have any other personal knowledge of, the conversations at issue in the detention hearing, nor did any affiant disclose evidence that would directly contradict the specific testimony of witnesses Raff, Bates, or Harding, as summarized by Agent Long. These affidavits do not meet the requirements of 18 U.S.C. § 3142(f)(2) for reopening the detention hearing.

B. Evidence of defendant's threats against federal officials.

The defendant argues that the government has not met its burden of proof to show that the defendant is a flight risk or a danger to the community.

At the detention hearing, the government bore the burden under 18 U.S.C. § 3142 of showing by clear and convincing evidence that no condition or conditions of release would reasonably assure the safety of the community if the defendant were released pending trial, and by a preponderance of the evidence that the defendant posed a flight risk. *See United States v. Gebro*, 948 F.2d 1118, 1121 (9th Cir. 1991). The defendant filed an Objection to the Detention Order on April 23, 2003. Chief Judge Winmill conducted a de novo review of the evidence presented at the hearing, *see United States v. Koenig*, 912 F.2d 1190, 1192-93 (9th Cir. 1990), and affirmed the Magistrate Judge's detention order on September 4, 2003. Judge Winmill found by clear and convincing evidence that under 18 U.S.C. 3142(g), the defendant posed a danger to the community, and by a preponderance of the evidence that the defendant posed a flight risk.

The Court is bound by the prior findings of Judges Winmill and Williams because they constitute the law of the case. The law of the case doctrine ordinarily precludes a successor judge from re-examining an issue previously decided by another judge in the same case. *See United States v. Maybusher*, 735 F.2d 366, 370 (9th Cir. 1984). I decline to reconsider the defendant's argument that the government failed as a matter of law to meet its burden of proving that the defendant poses a risk to the community, *see* Docket No. 220 at 5-15, because this is essentially the thrust of the same argument made and previously rejected in the defendant's objections to the detention hearing, *see* Docket No. 76 at 9-17.

Even if the Court were to reopen the evidence and now find that the government failed to meet its burden to show that the defendant's threats of violence rendered him a danger to the community, the defendant still has not presented any new legal arguments or evidence to rebut

Judge Williams' and Chief Judge Winmill's alternate finding that Hinkson also poses a flight risk. There was ample evidence presented in the detention hearing to establish that the defendant had transferred funds from his accounts in the Kamiah Community Credit Union to banks in other countries including Mexico and Antigua. In the tape-recorded conversation with Harding, the defendant himself mentioned the transfer of money to offshore accounts and he specifically referred to "end[ing] up in Antigua" if it looked like he was to be sent to prison. In that conversation, the defendant said:

> MR. HINKSON: I've arranged to put loans on everything. The feds didn't lien anything.
>
> THE INFORMANT: Putting loans on – I don't understand. You just started borrowing money against all your shit?
>
> MR. HINKSON: Everything.
>
> THE INFORMANT: Smart.
>
> MR. HINKSON: I'll have a million dollars worth of debt and it will all be in an offshore bank. Give me two weeks.
>
> [THE INFORMANT]: See, that's brilliant. That's smart.
>
> MR. HINKSON: I'm working hard.
>
> THE INFORMANT: Dude, I would rather you think like that.
>
> MR. HINKSON: Future Antiguan.

The defendant has provided no new evidence or argument to contradict these unrebutted facts regarding his financial capability and intention to evade this Court's jurisdiction.

C. Due process violation.

The defendant argues that due process considerations and the length of his pretrial detention require the Court to reopen the detention hearing. Excessively prolonged pretrial detention can violate a defendant's right to due process. *See United States v. Gelfuso*, 838 F.2d 358, 359 (9th Cir. 1988). The "due process limit on the length of pretrial detention requires assessment on a case by case basis." *Id.* Courts must "consider the length of confinement in conjunction with the extent to which the prosecution bears responsibility for the delay that has ensued." *Id.* Several courts have focused on at least three factors: "(1) the non-speculative length of expected confinement; (2) the extent to which the government (the prosecution and/or the court system) bears responsibility for pretrial delay; and (3) the strength of the evidence indicating a risk of flight, a threat to the trial process, and/or a danger to the community." *United States v. Ailemen*, 165 F.R.D. 571, 581 (N.D. Cal. 1996) (citing several cases in which these factor were considered).

The Court finds that by the end of the defendant's trial, he will have been detained for approximately thirteen months. The Ninth Circuit has held that the Due Process Clause was not violated where a defendant was held on pretrial detention for ten months plus the time consumed during trial. *United States v. Gelfuso*, 838 F.2d 358, 359 (9th Cir. 1988). In addition, a period of thirteen months falls within the time span in which courts are not inclined to find a violation of the Due Process Clause, where the government is not responsible for any significant portion for the delay. *See United States v. Ailemen*, 165 F.R.D. 571, 582-85 (N.D. Cal. 1996).

Since the defendant's arrest, trial has been delayed several times, primarily at the request of the defendant who has changed counsel three times. On April 9, 2003, upon the

defendant's motion, trial was continued from June 9, 2003, to September 29, 2003 (112 days). Trial was then moved to November 3, 2003, due to an internal court scheduling conflict (4 days). On October 10, 2003, a government motion to continue the trial to December 1, 2003, was granted (28 days). Trial was then reset to January 12, 2004, after the defendant's appointment of a new counsel (42 days). When the defendant decided to proceed pro se, trial was again moved to January 14, 2004 (2 days). When Mr. Hoyt appeared as defendant's third counsel in December 2003 and asked to continue trial to June 15, 2004, the Court scheduled trial for April 12, 2004 (89 days). Recently, the Court decided *sua sponte* to grant the defendant an extra two weeks and to accommodate the government's schedule to ensure continuity of counsel by setting the date of trial to April 26 (14 days). By my count, the defendant's motions are responsible for a total of 245 out of 291 days of delay. Given these numbers, the Court does not find that the government is responsible for a significant amount of delay.

Finally, the Court considers the strength of the evidence already of record indicating that the defendant is a flight risk or poses a danger to the community. As discussed above, it is the law of the case that the government met its burden of proof on both conditions justifying continued detention. None of the proffered evidence recently submitted adequately establishes a bases to reopen and reverse those rulings.

Because none of the three factors weight in defendant's favor, his right to due process is not infringed by the length of his pretrial detention. Defendant's Motion to Revoke the Detention Order and Grant Immediate Release on Conditions is DENIED.

II. Motion for Expedited De Novo Hearing on Motion to Revoke Detention Order and Grant Immediate Release on Conditions.

Given the decision above, an expedited threshold hearing and a de novo hearing are not necessary. The defendant's motion is DENIED as moot.

III. Production of exculpatory evidence.

Pursuant to Federal Rule of Criminal Procedure 26.2, the defendant sought to obtain any statement made by Agent Long that is in the government's possession and relates to the defendant's pretrial detention. The defendant also requested production of "FD 302" memoranda of interviews made by FBI agents in connection with the interview of Bates, Raff, and Harding. Finally, the defendant has requested that the government produce all "exculpatory evidence, impeachment evidence as to government witnesses and records of investigation" concerning his pretrial detention. *See Brady v. Maryland*, 373 U.S. 83 (1963). The government asserts that it has turned over all *Brady* material. In addition, the government has now provided redacted copies of the requested FBI interviews of the three government witnesses concerning the issues heard in the defendant's pretrial detention.[1] The Court has reviewed the discovery produced to defense counsel on January 22, 2004, and determines that the 302s contain no new exculpatory evidence not already known that is material to the detention issues.

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[1] The Government has redacted only those parts of the interview memoranda that would identify or lead to the current location of these witnesses.

ORDER

NOW THEREFORE IT IS HEREBY ORDERED that the defendant's Motion To Revoke Detention Order and to Grant Immediate Release on Conditions (Docket No. 219) is DENIED and the Motion for Expedited De Novo Hearing on Motion to Revoke Detention Order and to Grant Immediate Release on Conditions (Docket No. 236) are DENIED as MOOT. The Clerk shall separately file under seal copies of these memoranda to permit any subsequent appellant review.

IT IS SO ORDERED.

DATED this 28th day of January, 2004, at Seattle, Washington.

/s/ Richard C. Tallman
RICHARD C. TALLMAN
United States Circuit Judge
For the Ninth Circuit, sitting by designation

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

UNITED STATES OF AMERICA, Plaintiff, v. DAVID ROLAND HINKSON, Defendant.	)	Case No. CR-02-142-C-BLW **MEMORANDUM DECISION AND ORDER**

The Court has before it Defendant's Notice of Appeal and Objection to Magistrate's Detention Order (Docket No. 70), Motion to Strike United States' Response to Defendant's Objection to Detention Order (Docket No. 84), Motion to Dismiss with Prejudice Pending vs. Allegations in Pre-Trial Detention Proceeding and Indictment Charges Pursuant to Speedy Trial Act 18 U.S.C. 3161 et seq. and 5th and 6th Amendment to United States Constitution (Docket No. 95), and Motion to Quash Warrant of Arrest (Docket No. 65). After reviewing the briefing, the Court issues the following decision.

1. Motion to Strike United States' Response

Defendant moves to strike the Government's response to Defendant's Appeal of his detention for being an over-length brief in violation of the Local Rules. *See* Local Rule 7.1(a)(2) (limiting briefs to twenty (20) pages). After reviewing the Government's brief, the Court notes that the extra length is not excessive and is the result of including a

string of long quotes. The Court does not approve of any violation of the Local Rules and would caution counsel to seek leave of the Court prior to filing over-length briefs. However, under the circumstances presented here, the Court will deny Defendant's motion.

2. Appeal of Magistrate's Detention Order

On April 9, 2003, a Magistrate Judge ordered that Defendant be held prior to trial. Defendant then appealed the Magistrate Judge's Detention Order. This Court must make a *de novo* review, paying no deference to the Magistrate Judge's Order. *United States v. Koenig*, 912 F.2d 1190, 1192-93 (9th Cir. 1990). However, this Court has the option of holding an additional evidentiary hearing or considering the evidence as presented to the Magistrate Judge without conducting another evidentiary hearing. *Id.* After carefully reviewing the briefing and the transcript of the hearing conducted by Judge Williams, the Court is satisfied that the evidence presented at the hearing is sufficient, and the Court does not find it necessary to conduct an additional evidentiary hearing.

As the cornerstone of Defendant's argument that he should not be held pending trial, Defendant attacks the evidence presented at the evidentiary hearing before the Magistrate Judge. Defendant argues that Agent Long committed perjury while testifying at the detention hearing, and therefore his testimony should be discarded entirely. Defendant cites only two instances that he claims supports his accusation. However, those instances of alleged perjury are collateral to the issue which was before Judge Williams. Although the allegations may raise a general credibility issue concerning Agent Long, they certainly did not undermine the factual basis for Judge Williams's conclusion that the Defendant should be detained pending the trial in this matter. Even if the Court were to exclude those portions of Agent Long's testimony, there was more than ample evidence to

support Judge Williams' determination that Defendant poses a flight risk and a danger to the community.

The Court has also carefully reviewed each of Defendant's arguments and compared the testimony at the evidentiary hearing against the other evidence submitted by the Defendant. The Court finds that Judge Williams' decision should be affirmed.

Defendant argues that Agent Long's testimony about Defendant's post-arrest statements must be suppressed because Defendant requested to call his attorney while he was being arrested.

The Sixth Amendment right to counsel attaches at the initiation of adversary judicial criminal proceedings. *McNeil v. Wisconsin*, 501 U.S. 171, 175 (1991). This right is offense-specific. *Texas v. Cobb*, 532 U.S. 162 (2001). Thus, Defendant's representation by counsel in his ongoing criminal tax case did not trigger Sixth Amendment protection for the separate, uncharged offenses which were being investigated. What is troubling to the Court, however, is that the Government now seeks to use those statements against Defendant, not in the as-yet uncharged offenses relating to the threats allegedly made by the Defendant, but in the pretrial release revocation proceedings in the criminal matter in which the charges had already been filed and the Defendant had been provided legal representation. The Court's research has not disclosed any case law holding that statements received from a defendant under these circumstances may not be introduced as evidence during a pretrial release revocation hearing. However, the Court finds it unnecessary to break new ground and conduct an independent analysis of whether the Defendant's Sixth Amendment right to counsel was violated. This is so, because even if the Court disregards the Defendant's statements made at the time of his arrest there was sufficient additional evidence presented at the detention hearing to

support Judge Williams' determination that Defendant poses a flight risk and a danger to the community.

Defendant also argues that his Fifth Amendment right to counsel was violated and that therefore, his post-arrest statements should be suppressed. The Court will not address this issue because the Court has already determined that even in the absence of any post-arrest statements, there is sufficient evidence to find that Defendant poses a risk of flight and a danger to the community.

Under 18 U.S.C. § 3142, the Government bears the burden of showing by a preponderance of the evidence that the defendant poses a flight risk and by clear and convincing evidence that the defendant poses a danger to the community. *United States v. Gebro*, 948 F.2d 1118, 1121 (9th Cir. 1991). Section 3142(g) specifies the various factors that must be considered in determining whether there are conditions of release that will reasonably assure the appearance of the person and the safety of the community. 18 U.S.C. § 3142(g). These factors are: (1) the nature and seriousness of the offense charged; (2) the weight of the evidence against the defendant; (3) the defendant's character, physical and mental condition, family and community ties, past conduct, history relating to drug and alcohol abuse, and criminal history; and (4) the nature and seriousness of the danger to any person or the community that would be posed by the defendant's release. *Id.*; *Gebro*, 948 F.2d at 1121. Of these factors, the weight of the evidence is the least important, and the statute neither requires nor permits a pretrial determination of guilt. *Gebro*, 948 F.2d at 1121. Doubts regarding the propriety of a release are to be resolved in favor of the Defendant. *United States v. Townsend*, 897 F.2d 989, 994 (9th Cir. 1990).

The Court concludes by a preponderance of the evidence that Defendant is a flight risk. Mr. Harding, Ms. Bates, Ms. Raff all report that Defendant has talked about

fleeing rather than appearing at trial. He is very familiar with overseas travel and, as reflected in the body-wire recording, he talks about becoming an Antiguan. Prior to his arrest he had attempted to wire money through several countries. He maintains significant assets in Mexico and has borrowed large sums of money against his holdings in the United States. The Magistrate Judge previously held a hearing to determine whether Defendant violated a pretrial release condition that the Defendant surrender his passport and not obtain another one. Although Defendant did surrender his passport, he subsequently reapplied for another one.

The Court finds by clear and convincing evidence that Defendant poses a danger to the community. Defendant has spoken repeatedly about having someone kill the United States District Judge, Assistant United States Attorney, and IRS Special Agent associated with his criminal tax case. Three different people have stated that they witnessed Defendant placing $10,000 in someone's hands as payment for him to kill the District Judge, the AUSA, and the IRS Agent. All three witnesses could independently recall names of the people to be killed. One witness told investigators that during a trip to Mexico that Defendant offered $10,000 per victim to have people killed. The taped conversation between an informant and Defendant clearly reveals that Defendant had made statements that he would be willing to pay to have the three individuals killed.

In making its determination, the Court has considered the nature and seriousness of the offense charged; the weight of the evidence against the defendant; the defendant's character; physical and mental condition, family and community ties, past conduct, history relating to drug and alcohol abuse, and criminal history; and the nature and seriousness of the danger to any person or the community that would be posed by the defendant's release. The Court is convinced that no condition or combination of conditions of

release will assure that Defendant will not flee or pose a danger to the safety of any other person or the community. Thus, the Court has no choice but to order Defendant be detained pending trial.

3. Motion to Quash Arrest Warrant

The Court's decision to hold Defendant pending trial squarely addresses the arguments in this motion and renders this motion moot.

4. Motion to Dismiss with Prejudice

Defendant argues that the Indictment must be dismissed because more than thirty days have elapsed since his arrest and the date of indictment. Defendant misapplies the Speedy Trial Act.

Defendant was indicted on July 17, 2002, in a forty-three count indictment. On November 21, 2002, Defendant was ultimately arrested and made an initial appearance. Defendant was arraigned on the indictment on December 2, 2002. On April 4, 2003, the Court issued a warrant for Defendant's arrest based upon allegations that Defendant had violated the conditions of his pretrial release by attempting to hire someone to murder the United States District Judge, IRS Special Agent, and Assistant United States Attorney associated with his case. On April 9, 2003, a United States Magistrate Judge found that Defendant was a flight risk and danger to the community and ordered Defendant detained pending trial.

Thus, Defendant was arrested on a warrant charging him with a violation of his pretrial release. Defendant was not arrested on a warrant for the commission of a crime. Therefore, the Speedy Trial Act, 18 U.S.C. § 3161(b) does not apply to the April 4, 2003, arrest. *See Acha v. United States*, 910 F.2d 28, 30-31 (1st Cir. 1990); Wright & Miller:

Federal Prac. & Proc. § 833 p. 269-70 n. 18 (1982) (citing *United States v. Krippelbauer*, 463 F.Supp. 291 (D.C.Pa. 1978)).

Defendant also claims a Speedy Trial violation by citing that trial has not been held within ninety days of Defendant's pretrial detainment. The Speedy Trial Act requires that a pretrial detainee be tried within ninety days of pretrial detention; however, periods of delay that are excludable under § 3161(h) are not computed in the ninety-day time limitation. 18 U.S.C. § 3164(b). Beginning on December 16, 2002, the Defendant filed the first of three motions to continue, all of which resulted in excludable time under the Speedy Trial Act. Because the time period from April 9, 2003, until the September 29, 2003 trial, is excludable time, it is not calculated against Defendant's ninety-day period under 18 U.S.C. § 3164. *See United States v Lewis*, 980 F.2d 555, 563 (9th Cir. 1992); *United States v. Lemon*, 550 F.2d 467, 470 (9th Cir. 1977).

Finally, while the Defendant's motion to review detention was not promptly resolved, the Court will not order Defendant released, because the Court finds Defendant poses a danger to the community and a risk of flight. *See United States v. Gonzales*, 852 F.2d 1214 (9th Cir. 1988); *United State v. Barker*, 786 F.2d 475 (5th Cir. 1989); *see also United States v. Montalvo-Murillo*, 495 U.S. 711 (1990).[1]

ORDER

NOW THERFORE IT IS HEREBY ORDERED that Defendant's Notice of Appeal and Objection to Magistrate's Detention Order (Docket No. 70) and Motion to Strike

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[1] The Court is troubled by the passage of time which has occurred since the filing of the appeal and the issuance of this decision affirming Judge Williams's revocation of the Defendant's pretrial release. The Court offers no excuses for this failure other than its exceedingly busy trial calendar and case load.

United States' Response to Defendant's Objection to Detention Order (Docket No. 84) are DENIED. Defendant shall remain in custody pending trial.

IT IS FURTHER ORDERED that the Motion to Quash Warrant of Arrest (Docket No. 65) is DENIED AS MOOT.

IT IS FURTHER ORDERED that the Motion to Dismiss with Prejudice Pending vs. Allegations in Pre-Trial Detention Proceeding and Indictment Charges Pursuant to Speedy Trial Act 18 U.S.C. §3161 et. Seq. and 5th and 6th Amendment to the United States Constitution (Docket No. 95) is DENIED.

DATED this 3rd day of September, 2003.

/s/ B. Lynn Winmill
B. LYNN WINMILL
Chief Judge, United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

UNITED STATES OF AMERICA,	)	
	)	Case No. CR-02-142-C-BLW
Plaintiff,	)	
v.	)	
DAVID ROLAND HINKSON,	)	**ORDER**
Defendant.	)	

Pending before the Court is Defendant David Roland Hinkson's Motion to Reassign Entire Case, Including Detention Issue. Defendant argues that this Court should recuse itself under 28 U.S.C. § 455(a). Title 28, United States Code Section 455(a) states: "Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartially might reasonably be questioned." The standard for recusal under section 455(a) is: "Whether a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might be questioned." *United States v. Hernandez*, 109 f.3d 1450, 1453 (9th Cir. 1997). As the Supreme Court has explained "The goal of section 455(a) is to avoid even the appearance of partiality." *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 860 (1988). Although confident that it could in fact, be impartial, the Court does not disagree with the Defendant's contention that a reasonable person might question whether this Court could be impartial in a detention determination where the central issue is whether the Defendant threatened the life of the only

other district judge in Idaho. Therefore, the Court will refer all motions relating to Defendant's detention to Judge Tallman.

As for the hearing currently scheduled for January 30, 2004, the Court finds no basis for referral or for recusal. No reasonable person could conclude that this Court could not impartially determine whether Hinkson's right to communicate with his counsel is being infringed upon.

NOW THEREFORE, IT IS HEREBY ORDERED that Defendant's Motion to Reassign Entire Case, Including Detention Issue (Docket No. 242) is GRANTED IN PART and DENIED IN PART.

DATED this 23rd day of January, 2004.

/s/ B. Lynn Winmill
B. LYNN WINMILL
Chief Judge, United States District Court

18 U.S.C. 3142
Release or detention of a defendant pending trial

* * *

(e) Detention. – If, after a hearing pursuant to the provisions of subsection (f) of this section, the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community, such judicial officer shall order the detention of the person before trial. In a case described in subsection (f)(1) of this section, a rebuttable presumption arises that no condition or combination of conditions will reasonably assure the safety of any other person and the community if such judicial officer finds that –

(**1**) the person has been convicted of a Federal offense that is described in subsection (f)(1) of this section, or of a State or local offense that would have been an offense described in subsection (f)(1) of this section if a circumstance giving rise to Federal jurisdiction had existed;

(**2**) the offense described in paragraph (1) of this subsection was committed while the person was on release pending trial for a Federal, State, or local offense; and

(**3**) a period of not more five years has elapsed since the date of conviction, or the release of the person from imprisonment, for the offense described in paragraph (1) of this subsection, whichever is later.

Subject to rebuttal by the person, it shall be presumed that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of the community if the judicial officer finds that there is probable cause to believe that the person committed an offense for which a maximum term of imprisonment of ten years or more is prescribed in the Controlled Substances Act

(21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.), or an offense under section 924(c), 956(a), or 2332b of title 18 of the United States Code.

(f) Detention hearing. – The judicial officer shall hold a hearing to determine whether any condition or combination of conditions set forth in subsection (c) of this section will reasonably assure the appearance of such person as required and the safety of any other person and the community –

(1) upon a motion of the attorney for the Government, in a case that involves –

(A) a crime of violence;

(B) an offense for which the maximum sentence is life imprisonment or death;

(C) an offense for which a maximum term of imprisonment of ten years or more is prescribed in the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.); or

(D) any felony if such person has been convicted of two or more offenses described in subparagraphs (A) through (C) of this paragraph, or two or more State or local offenses that would have been offenses described in subparagraphs (A) through (C) of this paragraph if a circumstance giving rise to Federal jurisdiction had existed, or a combination of such offenses; or

(2) Upon a motion of the attorney for the Government or upon the judicial officer's own motion, in a case that involves –

(A) a serious risk that such person will flee; or

(B) a serious risk that such person will obstruct or attempt to obstruct justice, or threaten, injure, or intimidate, or attempt to threaten, injure, or intimidate, a prospective witness or juror.

The hearing shall be held immediately upon the person's first appearance before the judicial officer unless that person, or the attorney for the Government, seeks a continuance. Except for good cause, a continuance on motion of such person may not exceed five days (not including any intermediate Saturday, Sunday, or legal holiday), and a continuance on motion of the attorney for the Government may not exceed three days (not including any intermediate Saturday, Sunday, or legal holiday). During a continuance, such person shall be detained, and the judicial officer, on motion of the attorney for the Government or sua sponte, may order that, while in custody, a person who appears to be a narcotics addict receive a medical examination to determine whether such person is an addict. At the hearing, such person has the right to be represented by counsel, and, if financially unable to obtain adequate representation, to have counsel appointed. The person shall be afforded an opportunity to testify, to present witnesses, to cross-examine witnesses who appear at the hearing, and to present information by proffer or otherwise. The rules concerning admissibility of evidence in criminal trials do not apply to the presentation and consideration of information at the hearing. The facts the judicial officer uses to support a finding pursuant to subsection (e) that no condition or combination of conditions will reasonably assure the safety of any other person and the community shall be supported by clear and

convincing evidence. The person may be detained pending completion of the hearing. The hearing may be reopened, before or after a determination by the judicial officer, at any time before trial if the judicial officer finds that information exists that was not known to the movant at the time of the hearing and that has a material bearing on the issue whether there are conditions of release that will reasonably assure the appearance of such person as required and the safety of any other person and the community.

(g) Factors to be considered. – The judicial officer shall, in determining whether there are conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and the community, take into account the available information concerning –

(1) the nature and circumstances of the offense charge, including whether the offense is a crime of violence or involves a narcotic drug;

(2) the weight of the evidence against the person;

(3) the history and characteristics of the person, including –

(A) the person's character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings; and

(B) whether, at the time of the current offense or arrest, the person was on probation, on parole, or on other release pending trial, sentencing, appeal, or completion of sentence for an offense under Federal, State, or local law; and

(4) the nature and seriousness of the danger to any person or the community that would be posed by the person's release. In considering the conditions of release described in subsection (c)(1)(B)(xi) or (c)(1)(B)(xii) of this section, the judicial officer may upon his own motion, or shall upon the motion of the Government, conduct an inquiry into the source of the property to be designated for potential forfeiture or offered as collateral to secure a bond, and shall decline to accept the designation, or the use as collateral, of property that, because of its source, will not reasonably assure the appearance of the person as required.

18 U.S.C. § 3145
Review and appeal of a release or detention rrder

* * *

(b) **Review of a detention order.** – If a person is ordered detained by a magistrate judge, or by a person other than a judge of a court having original jurisdiction over the offense and other than a Federal appellate court, the person may file, with the court having original jurisdiction over the offense, a motion for revocation or amendment of the order. The motion shall be determined promptly.

(c) **Appeal from a release or detention order.** – An appeal from a release or detention order, or from a decision denying revocation or amendment of such an order, is governed by the provisions of section 1291 of title 28 and section 3731 of this title. The appeal shall be determined promptly. A person subject to detention pursuant to section 3143(a)(2) or (b)(2), and who meets the conditions of release set forth in section 3143(a)(1) or (b)(1), may be ordered released, under appropriate conditions, by the judicial officer, if it is clearly shown that there are exceptional reasons why such person's detention would not be appropriate.

18 U.S.C. 3148
Sanctions for violation of a release condition

* * *

(b) Revocation of release. – The attorney for the Government may initiate a proceeding for revocation of an order of release by filing a motion with the district court. A judicial officer may issue a warrant for the arrest of a person charged with violating a condition of release, and the person shall be brought before a judicial officer in the district in which such person's arrest was ordered for a proceeding in accordance with this section. To the extent practicable, a person charged with violating the condition of release that such person not commit a Federal, State, or local crime during the period of release, shall be brought before the judicial officer who ordered the release and whose order is alleged to have been violated. The judicial officer shall enter an order of revocation and detention if, after a hearing, the judicial officer –

(1) finds that there is –

(A) probable cause to believe that the person has committed a Federal, State, or local crime while on release; or

(B) clear and convincing evidence that the person has violated any other condition of release; and

(2) finds that –

(A) based on the factors set forth in section 3142(g) of this title, there is no condition or combination of conditions of release that will assure that the person will not flee or pose a danger to the safety or any other person or the community; or

(B) the person is unlikely to abide by any condition or combination of conditions of release.

If there is probable cause to believe that, while on release, the person committed a Federal, State, or local felony, a rebuttable presumption arises that no condition or combination of conditions will assure that the person will not pose a danger to the safety of any other person or the community. If the judicial officer finds that there are conditions of release that will assure that the person will not flee or pose a danger to the safety of any other person or the community, and that the person will abide by such conditions, the judicial officer shall treat the person in accordance with the provisions of section 3142 of this title and may amend the conditions of release accordingly.